not disclose the security constituted by the charging order. Thereupon, the judgment creditors applied for the petition to be amended. The county court judge allowed the application by the debtor, but on appeal to the divisional court his decision was reversed. The appellate court held, inter alia, that though the judgment creditors by virtue of the charging order had a charge on the judgment debtor's property, they had not completed the execution when they presented the bankruptcy petition against the judgment debtor and in the circumstances they could not be treated as a secured creditor for the purpose of the Bankruptcy Act. Goulding J in delivering the judgment of the court said, at p 493:

> For bankruptcy purposes, a charging order is not merely an instrument imposing a charge. It is also, for the purposes of s 40 of the 1914 Act, a form of execution, and the execution is not completed until the judgment creditor obtains the appointment of a receiver. If that is not done before (among other alternatives) the creditor has notice of the presentation of a bankruptcy petition, he is, by the operation of s 40, not entitled to retain the benefit of the charge against the trustee in bankruptcy. In other words he cannot rank as a secured creditor in the administration of the bankruptcy's estate. That follows from the decision of the majority of the Court of Appeal in *Re Overseas Aviation Engineering (GB) Ltd* [1983] 1 Ch 24, a case under the corresponding provisions of the Companies Act 1948

and he relied on the following passage of the judgment of Buckley LJ in *Rainbow* v *Moorgate Properties Ltd*[5] at p 825:

> The effect of the petition having been presented ... is that if eventually a winding-up order is made, the plaintiffs will be unable to insist on their charging orders, but if no winding-up order is ever made, and if the charging orders remain in force, the plaintiffs will remain secured creditors of the company.

In the result, we allow the appeal, set aside the judgment of the High Court and dismiss the application by way of notice of motion dated 13 January 1986 made by the bank. The bank will have to pay the costs here and below.

There will be the usual consequential order for payment to the Official Assignee or his solicitors the amount deposited by the bank as security for costs in this appeal.

Order accordingly.

Solicitors: *Shook Lin & Bok*; *Khattar Wong & Partners.*

Reported by *PS Ranjan*

Lee Hiok Tng & Anor v Ng Yuk Wah & Ors

HIGH COURT (SINGAPORE) – ORIGINATING SUMMONS NO 1057 OF 1984
LAI KEW CHAI J
14 JULY 1988

Trusts and trustees – Wills – Construction – Conflicting directions in will – Date of vesting – Ascertainment of class of beneficiaries – Class closing rules

By a will dated 2 March 1961, the testator directed that the date of distribution be the date five years after his death. He died on 14 February 1964 and the date of distribution was hence 14 February 1969. After making certain specific bequests, he made provision for the distribution of the income of his residuary estate by cl 17 of his will. By cl 18 of his will, he made provision for the corpus of his residuary estate. By cl 17(h) of the will, the testator directed that his second wife Bek Chew Tay receive a certain portion of the distributable income of his residuary estate but that if she died before the date of distribution, that portion was to be passed to or distributed amongst the testator's son or sons by her but if there be no such son or sons it was to be added on to the residue of his estate to be applied and dealt with in accordance with cl 17(e) of the will. By cl 17(e), the testator made provision for the purchase of immovable property in China and the maintenance and upkeep of the ancestral home and for ancestor worship but it was common ground between the parties that none of those purposes could be effected. However, it was further directed by cl 17(e) that the balance of the income and property, if any, was to be accumulated until the youngest of the testator's grandsons by his sons shall attain the age of twenty-one years and was to be divided equally amongst all such grandsons. However, by cl 18 of the will, the testator gave a different direction regarding the corpus of his residuary estate in that he directed the distribution of the corpus on the date of distribution amongst various beneficiaries mentioned in cl 17(b) of the will, including his sons and grandsons. By cl 23 of the will, the testator directed that any property ineffectively disposed of by his will was to pass to his seven sons named therein. Bek Chew Tay died before the testator died and therefore also before the date of distribution.

The questions that arose in regard to the construction of the will were:

(1) whether on the date of distribution Bek Chew Tay's portion of the corpus of the residuary estate became divisible under cll 17(b)(vi) and 18 of the will
   (i) between those sons of the testator of whom she was the mother; or
   (ii) in some other, and, if so, what manner;

(2) whether on the date of distribution, the shares in the said corpus dealt with by cl 17(e) of the will became or will become applicable under cl 17(b)(vii) and cl 18 of the will
   (i) upon trusts for ancestor worship; or
   (ii) upon trusts for the benefit of all the testator's grandsons living at his death; or
   (iii) upon trusts for the benefit of all the testator's grandsons in being at the date of distribution; or
   (iv) upon trusts for the benefit of all the testator's grandsons whether or not in being at the date of distribution living when the last of such grandsons shall attain the age of twenty-one years; or

(v) upon trusts for the benefit of all the testator's grandsons whenever born; or
(vi) upon some other, and if so, what trusts; and

(3) consequential upon the answers to the second question: whether any part (and if so, what part), of the corpus of the residuary estate of the testator
(i) would but for the provisions of cl 23 of the will, pass as on an intestacy; or
(ii) fell to be treated as effectively disposed of by the earlier provisions of the will.

Held: (1) Although the will was silent with regard to the eventuality of Bek Chew Tay's death before the death of the testator, it was plain that cl 17(h) of the will gave her portion of the capital to the testator's sons by her if she died, as she did, before the date of distribution.

(2) As regards the second question, which involved the date of vesting, by cl 17(e) of the will, the plaintiffs were to accumulate the income and divide all the capital as accumulated amongst all the testator's grandsons living when the youngest grandson attained the age of twenty-one years. By cl 18 of the will, the testator had directed that the capital be divided at the time when the class could not be ascertained. The difficulty might therefore be resolved by the application of what were called the class closing rules. There is a policy in favour of early vesting which has created certain artificial rules of construction or what are called rules of convenience. The rules have been applied to enable a member of the class who has a share vested absolutely both in interest and possession to receive his share. Notwithstanding the conflicting directions of the will under cll 17(e) and 18, the class of grandsons who will take under the will should be treated as closed on the date of distribution and any grandson as defined born after that date will have no beneficial claim to the capital. Because there was a conflict of testamentary directions, the court had to resort to the rules of convenience. Although the rules were artificial, to close the class of grandsons on the date of distribution was significantly less artificial than to do so on the date of death of the testator, and the court could only hope that its approach would more effectively and as nearly as possible approximate the wishes such as they could be gleaned of the testator.

Cases referred to
1 *Ive* v *King* (1852) 16 Beav 46; 51 ER 693 (refd)
2 *Re Ransome* [1957] 2 WLR 556 (refd)
3 *Re Manners* [1955] 1 WLR 1096 (refd)
4 *Andrews* v *Partington* (1791) 3 Bro CC 401; 29 ER 610 (refd)
5 *Knox* v *Wells* (1864) 2 Hem & M 674; 71 ER 626 (refd)
6 *Re Wood, Moore* v *Bailey* (1880) 43 LT 730 (refd)

Ching Chiak Yong for the plaintiffs.

Cheng Tim Pin for the three sons of the second wife Bek Chew Tay and all the sons of the testator.

Karan Nair for the grandsons by the sons who were born after the date of distribution and unborn grandsons by the sons and the daughters of the testator by the second wife Bek Chew Tay.

Tan Kok Quan for the grandsons born before and living at the date of distribution and the five grandsons by the adopted son.

Lo Kok Siong for the grandsons living at the date of the testator's death.

TPB Menon for the grandsons born but died before the date of distribution.

Cur Adv Vult

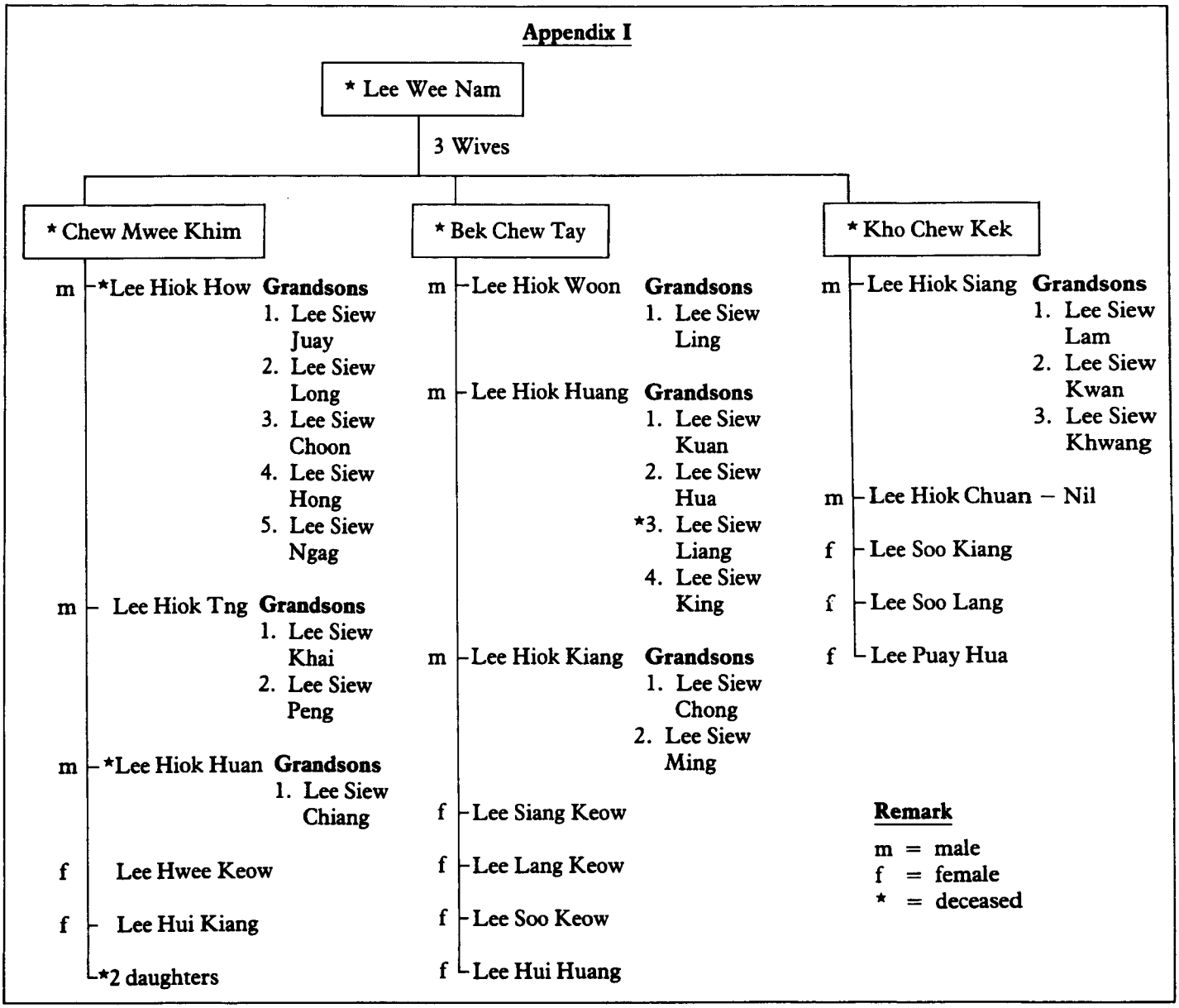
Lai Kew Chai J: The testamentary dispositions made on 2 March 1961 in the will of Lee Wee Nam, who died on 14 February 1964, have given rise to two issues of construction in these proceedings.

The problems of construction arise in the following factual matrix. The testator came from Swatow, in the southern part of the People's Republic of China, when he was a teenager. He prospered as a businessman and a banker and had three wives, namely Chew Mwee Khim, Bek Chew Tay and Kho Chew Kek, eight sons, the eldest of whom was adopted, and eleven daughters. He left behind by the male line several grandsons. By his will 'the date of distribution' is stipulated to be the date of expiry of five years after the date of his death, and accordingly 'the date of distribution' is 14 February 1969. The 26th defendant, Lee Siew Chong, is the youngest grandson born on or before 'the date of distribution', having been born on 2 August 1966. It will be relevant to note that he became 21 years old on 2 August 1987. For present purposes, it is also relevant to note that the 27th defendant, Lee Siew Ming, is the grandson of the testator who was born after 'the date of distribution', having been born on 16 April 1971. I should also mention that the 24th defendant is the personal representative of another grandson known as Lee Siew Liang who was born on 1 September 1961 but who died on 22 April 1968. He therefore died before 'the date of distribution'. The particulars of the family tree of the testator are annexed hereto as appendix I. The various classes of possible beneficiaries are represented before me by learned counsel in these proceedings.

The testator after making several specific bequests mainly to the daughters made provisions for the distribution of the income of his residuary estate by cl 17 of his will. By the next clause, he dealt with the corpus of his residuary estate. The income of the residuary estate was divided into four parts, one part of which is by cl 17(c) directed to be accumulated and added to the capital for disposal under cl 18. The remaining three-fourths of the income was divided into 40 shares under cl 17(b). Clause 17 of the will directed the plaintiffs who are the executors of the will and personal representatives of the testator to pay out once a year the income until the date of distribution by several paragraphs. The entire cl 17 has to be and is reproduced below:

> Subject to the payment of my just debts funeral and testamentary expenses I give devise and bequeath all the rest and residue of my property both movable and immovable and wheresoever situate unto my trustees upon trust to sell call in and convert the same into money with power in their absolute discretion to postpone such sale calling in and conversion (subject as to my said businesses to the discretion contained in cl 16 hereof) and to invest the net proceeds thereof in their names in any of the investments authorized by law and in the purchase of freehold and 999 years leasehold properties and to stand possessed of such investments

Appendix I


* Lee Wee Nam
3 Wives
* Chew Mwee Khim
* Bek Chew Tay
* Kho Chew Kek
m *Lee Hiok How Grandsons 1. Lee Siew Juay 2. Lee Siew Long 3. Lee Siew Choon 4. Lee Siew Hong 5. Lee Siew Ngag
m Lee Hiok Tng Grandsons 1. Lee Siew Khai 2. Lee Siew Peng
m *Lee Hiok Huan Grandsons 1. Lee Siew Chiang
f Lee Hwee Keow
f Lee Hui Kiang
*2 daughters
m Lee Hiok Woon Grandsons 1. Lee Siew Ling
m Lee Hiok Huang Grandsons 1. Lee Siew Kuan 2. Lee Siew Hua *3. Lee Siew Liang 4. Lee Siew King
m Lee Hiok Kiang Grandsons 1. Lee Siew Chong 2. Lee Siew Ming
f Lee Siang Keow
f Lee Lang Keow
f Lee Soo Keow
f Lee Hui Huang
m Lee Hiok Siang Grandsons 1. Lee Siew Lam 2. Lee Siew Kwan 3. Lee Siew Khwang
m Lee Hiok Chuan – Nil
f Lee Soo Kiang
f Lee Soo Lang
f Lee Puay Hua
Remark
m = male
f = female
* = deceased

and properties and the investments representing the proceeds of sale of any of my said businesses or any shares and interest in any of such businesses and of all parts of my estate for the time being unsold (hereinafter called 'my residuary estate') upon the following trusts that is to say:

(a) Upon trust to manage the same until the expiration of the period of five (5) years from the date of my death (hereinafter called 'the date of distribution') and until such date to collect the rents income and profits thereof and after payment thereout of all necessary outgoings to pay out of the balance of such rents income and profits to my second wife the said Bek Chew Tay the monthly sum of dollars eight hundred ($800) in respect of the household expenses of my family residence no 17 Exeter Road, Singapore or other family residence for the time being and in addition the monthly sum of dollars one hundred and fifty ($150) for her personal needs provided that if my said second wife the said Bek Chew Tay shall die before the date of distribution then and in such event my trustees shall stop payment of the said monthly allowance to her. And I declare that on the death of my second wife the said Bek Chew Tay the monthly sum of dollars eight hundred ($800) in respect of the household expenses of my family residence shall be paid to any one of my daughters-in-law in the discretion of my trustees.

(b) Upon trust to divide three-fourths of the remainder of such rents income and profits into forty (40) shares and pay the same until the date of distribution once a year as follows:

(i) Four (4) shares to my five grandsons the male issue of my adopted son Lee Hiok How born to him by his wife Koh Nguang Keow as follows:
   (1) Two equal sixth parts or shares of the said four shares to my grandson Lee Siew Juay and
   (2) One-sixth part or share of the said four shares to each of my grandsons Lee Siew Yong, Lee Siew Tsun, Lee Siew Hong and Lee Siew Ngak;

(ii) Four (4) shares to my son the said Lee Hiok Tng;

(iii) Four (4) shares to my son the said Lee Hiok Woon;

(iv) Four (4) shares to my son the said Lee Hiok Huan;
(v) Four (4) shares to each of my sons Lee Hiok Siang, Lee Hiok Huang, Lee Hiok Kiang and Lee Hiok Chuan;
(vi) One and a half (1½) shares to my second wife the said Bek Chew Tay;
(vii) As to the remaining six and a half (6½) shares I direct my trustees to set aside three and a half (3½) shares thereof for each son (hereinafter called 'after-born son') that shall be born to me by my second wife the said Bek Chew Tay after the date of this my will and the balance, if any, to be applied as hereinafter mentioned in sub-cl (e) of this clause.

(c) Upon trust to accumulate the remaining one-fourth of the said remainder of the rents income and profits by investing the same in the manner authorized herein for the investment of my residuary estate to the intent that the resulting income thereof and all such accumulations shall be added to the respective shares of all the beneficiaries hereinafter referred to in cl 18 hereof and devolve therewith but subject to the trusts declared in the said cl 18 of this my will.

(d) Provided that if any beneficiary hereinbefore mentioned shall not be of age and not in a position to give a valid discharge for his share of the rents income and profits of my residuary estate declared in sub-cl (b) of this clause such beneficiary's shares shall be retained by my trustees and invested according to law and such part thereof as they may think fit shall be expended by them for the maintenance support and education of such infant beneficiary until he shall attain the age of twenty-one years when the whole or balance of his share of the rents income and profits shall be paid to him.

(e) Provided also as to the six and a half (6½) shares bequeathed to after-born sons that if there be more than two (2) after-born sons the said six and a half (6½) shares shall be equally divided among them but if there be no such after-born son or if there be not more than one such after-born son then and in such case I direct my trustees in their absolute discretion to invest the whole or the residue (as the case may be) of the said six and a half (6½) shares and such further shares that may be added thereto on the happening of any of the events mentioned in sub-cll (g) and (h) of this clause in the purchase of immovable property in my village or elsewhere in China and the income arising therefrom shall be applied for the maintenance and upkeep of my ancestral home in China and for the worship of my Sinchew and the Sinchews of my second wife the said Bek Chew Tay and my deceased wives the said Chew Mwee Kim and Kho Chew Kek and those of my departed ancestors and I declare that the immovable property so purchased as aforesaid shall descend unto my male descendants according to the laws of China and further I declare that on completion of the purchase of the immovable property hereinbefore mentioned my trustees shall be absolved from all trusts in respect of the said six and a half (6½) shares or the residue thereof and such additions (if any) thereto aforesaid. Further I also declare that my trustees may at their absolute discretion postpone the purchase of any immovable property as aforesaid and invest the said six and a half (6½) shares or the residue thereof and such additions (if any) thereto in any of the investments authorized by the laws of the state of Singapore or those of China relating to investments and stand possessed of such investments and the rents income and profits thereof and after payment of all necessary outgoings upon trust to pay or apply the balance of such rents income and profits for the same purpose as are immediately abovementioned. And further I also declare that in the event of it being impracticable for my trustees to purchase immovable property in my village or elsewhere in China then in such case I direct that my trustees shall stand possessed of the said six and a half (6½) shares or the residue thereof and such additions (if any) thereto or the investments representing the same upon trust to apply the rents income and profits thereof after payment of all necessary outgoings for the worship of my Sinchew and the Sinchews of my second wife the said Bek Chew Tay and those of my deceased wives the said Chew Mwee Khim and Kho Chew Kek and of my departed ancestors and to accumulate the balance thereof (if any) until the youngest son of my sons shall attain the age of 21 years and to divide the said six and a half (6½) shares or the residue thereof and such additions (if any) thereto or the investments representing the same and all accumulations of rents income and profits (if any) thereof equally amongst all my grandsons by my sons including the sons of my adopted son the said Lee Hiok How then living.

(f) Provided further that if any of the hereinbefore mentioned sons including after-born sons has died in my lifetime or shall die before the date of distribution leaving male issue surviving and living at the date of distribution the shares of the rents income and profits hereinbefore bequeathed which such deceased son would have taken in my residuary estate had he lived until such date shall be taken by his male issue if more than one in equal shares.

(g) And provided further that if such deceased son shall leave no male issue but a widow surviving then and in such event such widow shall within a period of five years from the date of the death of her husband but not extending beyond the date of distribution adopt a son or sons from amongst the issue of any of my sons or daughters or after-born sons and the shares of such deceased son in the rents income and profits of my residuary estate shall be paid to such adopted son and if more than one in equal shares provided that if such widow does not within such period adopt a son or sons as aforesaid then and in such event the shares of such deceased son shall lapse and be added to the residue of the six and a half (6½) shares of my residuary estate or the whole thereof as the case may be hereinbefore mentioned in sub-cl(e) of this clause.

(h) And provided further that if my second wife the said Bek Chew Tay shall die before the date of distribution or remarry after my death or lead an unchaste life or live apart from my family then in any such events her shares in the rents and profits of my residuary estate shall be taken by such sons as may have been born to me by her if more than one in equal shares but if there be no such son or sons then I declare that the said shares of such wife shall lapse and be added to the residue of the six and a half (6½) shares of my residuary estate or the whole thereof as the case may be hereinbefore mentioned in sub-cl(e) of this clause.' (names in Chinese within brackets)

I The second wife of the testator Bek Chew Tay died intestate on 24 May 1961, leaving her surviving the following children:

Names	*Relationship*	*Plaintiff/ Defendant*
(1) Lee Hiok Woon	son	2nd plaintiff
(2) Lee Hiok Huang	son	2nd defendant

Names	*Relationship*	*Plaintiff/ Defendant*
(3) Lee Hiok Kiang	son	3rd defendant
(4) Lee Siang Keow	daughter	11th defendant
(5) Lee Lang Keow	daughter	12th defendant
(6) Lee Soo Keow	daughter	13th defendant
(7) Lee Hui Huang	daughter	14th defendant

It has to be stated that there were no after-born sons born to the testator by the second wife.

With regard to the testator's direction under cl 17(e) that 6½ shares out of the 40 shares were to be invested in the purchase of immovable property in China and that income therefrom was for the maintenance and upkeep of the ancestral home and ancestral worship, it was common ground that the purchase of immovable property in Swatow or elsewhere in mainland China was impractical since property ownership of private property was not allowed. It was also common ground that all parties concerned were not aware of any ancestral home of the testator in China, the testator and his three wives having died and were buried in Singapore. It was also not disputed that no ancestral worship was carried out by relatives of the testator in China and for the worship of the testator's Sinchew and the Sinchews of his three wives.

I now refer to cl 18 of the will which deals with the capital of the residuary estate. Clause 18 reads as follows:

> As to the corpus of my residuary estate my trustees shall on the date of distribution pay and divide the same between all the beneficiaries referred to in cl 17(b) hereof in the same proportion and shares in which the rents income and profits of my residuary estate referred to therein are to be divided among them. Provided that in the distribution of the corpus of my residuary estate my trustees shall observe and perform the same trusts and powers as are declared and contained in the said cl 17 of this my will in respect of the application of the rents income and profits of my residuary estate except that my trustees shall in carrying out and performing the said trusts substitute the word 'corpus' in place of the words 'rents income and profits' in all respects as if the word 'corpus' has therein been expressed instead of the words 'rents income and profits'.

For the purpose of this clause, it is relevant to state the particulars of the grandsons of the sons of the testator and they are as follows:

Sons	*Grandsons*	*Date of Birth*
(1) Lee Hiok Tng (1st plaintiff)	Lee Siew Khai (15th defendant)	19 July 1954
	Lee Siew Peng (16th defendant)	27 June 1959
(2) Lee Hiok Woon (2nd plaintiff)	Lee Siew Ling (17th defendant)	15 February 1961
(3) Lee Hiok Huan (1st defendant)	Lee Siew Chiang (18th defendant)	5 July 1958
(4) Lee Hiok Siang (14th defendant)	Lee Siew Lam (19th defendant)	28 December 1958
	Lee Siew Kwan (20th defendant)	26 June 1961
	Lee Siew Khwang (21st defendant)	9 October 1965
(5) Lee Hiok Huang (2nd defendant)	Lee Siew Kuan (22nd defendant)	25 January 1957
	Lee Siew Hua (23rd defendant)	30 December 1957
	Lee Siew Liang (24th defendant)	1 September 1961 (died 22 April 1968)
	Lee Siew King (25th defendant)	29 December 1963
(6) Lee Hiok Chuan (5th defendant)	Nil	
(7) Lee Hiok Kiang (3rd defendant)	Lee Siew Chong (26th defendant)	2 August 1966
	Lee Siew Ming (27th defendant)	16 April 1971

The testator took care to provide against any invalid or ineffective testamentary disposal of his property. He directed that any property ineffectively disposed of by his will shall pass to his seven sons, namely Lee Hiok Tng, Lee Hiok Woon, Lee Hiok Huan, Lee Hiok Siang, Lee Hiok Huang, Lee Hiok Chuan and Lee Hiok Kiang. Clause 23 provides as follows:

> I direct that if any court of competent jurisdiction shall declare any devise or bequest contained in this my will to be invalid with the result that the property thereby devised or bequeathed would but for this clause pass as on an intestacy then and in such event I expressly devise and bequeath all and any such property:
>
> (i) As to one share to my said son Lee Hiok Tng;
> (ii) As to one share to my said son Lee Hiok Woon;
> (iii) As to one share to my said son Lee Hiok Huan;
> (iv) As to one share to my said son Lee Hiok Siang;
> (v) As to one share to my said son Lee Hiok Huang;
> (vi) As to one share to my said son Lee Hiok Chuan;
> (vii) As to one share to my said son Lee Hiok Kiang;
> (viii) As to one share to the male issue of my adopted son Lee Hiok How born to him by his wife Koh Nguang Keow living at the date of distribution in equal shares and if only one then the whole share to that one;
>
> I also expressly give devise and bequeath all or any property whatsoever not otherwise hereinbefore disposed of by me effectively or in accordance with law to the same persons and in the aforesaid proportions subject in both cases to the provisions in cl 17 (f) and (g) and cl 19 contained.

The names of the grandsons by Lee Hiok How, the adopted son of the testator, and born to his wife Koh Nguang Keow are:

(1) Lee Siew Juay	(6th defendant)
(2) Lee Siew Yong	(7th defendant)
(3) Lee Siew Choon	(8th defendant)
(4) Lee Siew Hong	(9th defendant)
(5) Lee Siew Ngag	(10th defendant)

In these circumstances, the plaintiffs as the executors of the will and personal representatives of the testator seek the determination of the following questions on the true construction of the relevant clauses of the will and having regard to the events which had happened:

(1) Whether, on the date of distribution defined in cl 17(a) of the said will, one and a half shares in the corpus of the residuary estate of the said testator became divisible under cll 17(b)(vi) and 18 of the said will

(i) between those sons of the testator of whom his second wife (Bek Chew Tay, who predeceased him) was the mother, namely, the second plaintiff and the second and third defendant, in equal shares, or
(ii) in some other, and, if so, what manner.

(2) Whether, on the said date of distribution, six and a half shares in the said corpus became or will become applicable under cl 17(b)(vii) and cl 18 of the said will

(i) upon the trusts for ancestor worship declared in the said cl 17(b)(vii) and cl 17(e); or
(ii) upon trusts for the benefit of all the testator's grandsons living at his death; or
(iii) upon trusts for the benefit of all the testator's grandsons in being at the said date of distribution; or
(iv) upon trusts for the benefit of all the testator's grandsons, whether or not in being at the date of distribution living when the last of such grandsons shall attain the age of 21 years; or
(v) upon trusts for the benefit of all the testator's grandsons whenever born; or
(vi) upon some other, and if so, what trusts.

The third question for the court's determination, which is consequential upon the answers to the second question, is in the following terms:

Whether any part, (and if so, what part), of the corpus of this residuary estate of the testator

(i) would, but for the provisions of cl 23 of the said will, pass as on an intestacy; or
(ii) falls to be treated as effectively disposed of by the earlier provisions of the said will.

I now turn to the first question whether on the date of distribution the one a half shares in the corpus of the residuary estate of the testator became divisible under cll 17(h) and 18 of the will to the second plaintiff and the second and third defendants or whether it has lapsed and should be added to the six and a half shares under cl 17(e). Counsel for the plaintiffs, Mr Ching Chiak Yong, submitted that cl 17(h) has provided for an alternative or substitutional gift. He contended that in view of the fact that the second wife, Bek Chew Tay, had predeceased the testator, the three sons of the testator by her should take in equal shares. He relied on *Ive* v *King*.[1]

Mr Tan Kok Quan, counsel for the grandsons born before and living at the date of distribution and the five grandsons by the adopted son, Lee Hiok How, submitted that the gift of one and a half shares to Bek Chew Tay had lapsed. He pointed out that cl 17(h) provided for the eventuality of her death before the date of distribution. He also submitted that since the will is silent with regard to her death before the testator, the gift was not effectively disposed of. However, it is plain that the situation has been catered for by cl 17(h) which gives her one and a half shares of the capital, if she dies, as she did, before the date of distribution, to those sons of the testator by his second wife, and they are, as I had mentioned, Lee Hiok Woon, Lee Hiok Huang and Lee Hiok Kiang.

I now turn to the second question whether on the date of the distribution the six and a half shares of his corpus became held upon trust (i) for the benefit of all the grandsons on the date of distribution until the youngest attain the age of 21 years, or (ii) for the testator's grandsons on the date of distribution. The question is the date of vesting. I make reference again to cll 18 and 17(e) of the will which have been recited above. It will be seen that cl 17(e) provides that in the events which had happened and which I have recited, the plaintiffs are to accumulate the income and divide all the capital as accumulated amongst all the testator's grandsons (the sons of Lee Hiok How are expressly included) living when the youngest grandson attains the age of 21 years. It will also be seen that cl 18 directs that the plaintiffs shall as regards the corpus of the residuary estate on the date of distribution pay and divide the same between all the beneficiaries referred to in cl 17(b) above in the same proportion and shares in which the income of the residuary estate referred to therein are to be divided amongst them. It will therefore be seen that by cl 18 the testator has directed the capital to be divided at the time when the class cannot be ascertained and by cl 17(e) the testator has directed that all the grandsons living when the youngest grandson attains the age of 21 years are to take. Both counsel for the plaintiffs and counsel for the grandsons born before and living at the date of distribution contended, and I accept their submissions, that the difficulty may be resolved by the application of what are called the class closing rules. Mr Karan Nair represented the grandsons born after the date of distribution and unborn grandson by the sons and daughters of the testator by the second wife Bek Chew Tay. His submissions were similar to those of Mr Tan Kok Quan. So were the alternative submissions of Mr Lo Kok Siong who represented the interests of the grandsons living at the date of the testator's death. I should also briefly refer to the submissions of Mr Cheng Tim Pin who represented the three sons of the second wife Bek Chew Tay and all the sons of the testator. He submitted that the trusts under cl 17(e) are not affected by the date of distribution as several expressions there indicated an intention for the trusts to operate beyond the period of distribution. He also submitted that accordingly the class closing rules have no application and that cl 23 should apply. For the reasons hereinafter appearing, I do not accept his submissions.

In *Re Ransome*,[2] at p 563 Upjohn J (as he then was), after referring to a number of authorities, conceded that the policy in favour of early vesting has created certain

artificial rules of construction or what are called rules of convenience. In consequence, an immediate gift for example to the children of A when 'contrary to its natural meaning' would be construed as a gift to the children living at the death of the testator, to the exclusion of after-born children. He then referred to *Re Manners*[3] where he held that a direction only to distribute the share on the youngest attaining 21 did not evince a contrary intention to displace the rule, though it has to be noted that it was there conceded that the gift vested absolutely on the death. Upjohn J also referred to the well-known rule in *Andrews* v *Partington*[4] which held that where there is a class gift to the children of A when they attain 21, the class closes when the eldest child attains 21. It is a useful reminder to understand the rationale for these rules of convenience in the construction of a will. As Upjohn J stated, the rules have been applied to enable a member of the class who has a share vested absolutely both in interest and possession to receive his share. That rationale seemed to Upjohn J 'to be the whole reason for these rules'.

It is now convenient to refer to what is stated in 50 *Halsbury's Laws of England*, 4th Ed, paras 490 and 492, in relation to the first and second rules of convenience. Paragraph 490 states:

> The first rule of convenience is as follows: a class is prima facie composed of those members (if any) existing, ascertainable and capable of taking at the date of distribution, which is usually at the testator's death, but where the date of distribution is later the class opens so as to let in all those members coming into existence before the date of distribution.

Para 492 states:

> The second rule of convenience deals with the determination of the date of distribution where the gift is of the corpus of property and is postponed by reason of the conditions attached to it, as where payment is to be made on the attainment by the donee of a specified age, or on his or her marriage, or in other cases, it appears, where such conditions are of a nature personal to the donees. The rule is as follows: where the postponement of enjoyment is due to conditions attached to the gift, the date of distribution is considered to be reached as soon as the conditions are so far performed that some one member of the class would be entitled to the enjoyment of his share, if the class were then not susceptible of increase, and the class is then closed. Thus, where there is an immediate gift to a class, to be paid on the members attaining a specified age, the date of distribution is the date of the testator's death, if any member of the class has then attained that age, and if not, the time of the first occasion when a member attains that age.

With regard to the application of the second rule of convenience, part of para 493 states:

> The second rule of convenience is adopted to reconcile inconsistent directions in a will that all the children or other persons comprising the class are to take, but that the fund is to be divided at a time when the class cannot be ascertained.

In my judgment, notwithstanding the conflicting directions of the will under cll 17(e) and 18, the class of grandsons who will take under the will should be treated as closed on the date of distribution and any grandson as defined born after the date will have no beneficial claim to the capital. As has been noted, Lee Siew Chong, the 26th defendant, was the youngest grandson born before the date of distribution, having been born on 2 August 1966. Accordingly, the capital will therefore be distributed amongst all the grandsons as defined born on or before the date of distribution and living when the said Lee Siew Chong attained the age of 21 on 2 August 1987.

Mr TPB Menon, who was appointed by this court to represent the estate of Lee Siew Liang, the 24th defendant, who died on 1 September 1961 before the date of distribution, submitted that of the two possible dates of vesting, either on the date of death of the testator on 14 February 1964 or on the date of distribution on 14 February 1969, the court should take the earlier date as the date of vesting. Relying on *Knox* v *Wells*[5] and *Re Wood, Moore* v *Bailey*,[6] he submitted that the intention of the testator was to benefit a particular class, namely his grandsons by blood including the sons of his adopted son, Lee Hiok How. He further urged the court to decide that a direction that the capital is to be distributed when the youngest grandson attains the age of 21 should not postpone the vesting. If, as he submitted, the interest of the estate of Lee Siew Liang in the capital had vested on the death of the testator, such interest would only be diluted in quantum by the birth of further members of the class. As a matter of construction, Mr TPB Menon noted that a gift in this case was not restricted to grandsons living at the date of distribution or living when the youngest grandson attained 21 years. He said that the words 'then living' in cl 17(e) were inserted to qualify the sons of the adopted son, Lee Hiok How, and not the grandsons by birth. Finally, he also called in aid the policy of the law to favour early vesting of class gifts and he relied on the decision in *Re Ransome*.[2] To support his contention that this court should not permit the class to close artificially and belatedly on the date of distribution, he submitted that this court can give a literal interpretation to the will. Mr Lo Kok Siong's first submission supported Mr Menon's contentions. I must confess that Mr Menon's submissions have a great deal of force but at the end of the day I am not persuaded that vesting should take place on the date of death of the testator. This court has to recognize that there is a conflict in the testator's directions to which I had referred. Since there is a conflict, the intention of the testator is therefore not clear. If it were, it would have been a simple matter of construction to give effect to such manifest intention. Because there is a conflict of testamentary directions the court has to resort to the rules of convenience. In the context of this will the testator has fixed the date of distribution

which is or is most probably the date the residuary estate should be divided and vest in a class of beneficiaries though payment might be as is in this case postponed. Both rules of convenience are admittedly artificial. But in my view to close the class of grandsons on the date of distribution is significantly less artificial than to do so on the date of death of the testator and this court can only hope that its approach would more effectually and as nearly as possible approximate the wishes such as they could be gleaned of the testator.

As regards costs, I order that in view of the complexities of this case, the costs of all classes represented before this court shall be taxed on a solicitor and client basis and be paid out of the capital of the estate of the testator. There will be orders accordingly and parties are directed to settle the draft orders and appear before me on a date to be fixed by the registrar.

Order accordingly.

Solicitors: *Ching & Co*; *Yap & Yap*; *Ong Tan & Nair*; *Lee & Lee*; *Allen & Gledhill.*

Reported by *P'S Ranjan*

MALAYSIAN REPORTS

Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor

SUPREME COURT (KUALA LUMPUR) – CIVIL APPEAL NO 384 OF 1987
SALLEH ABAS LP, WAN SULEIMAN AND ABDOOLCADER SCJJ
6 JANUARY AND 22 MARCH 1988

Administrative Law – Dismissal of bank officer – Held to be unduly harsh and without just cause and excuse by Industrial Court – Compensation in lieu of reinstatement – Application for certiorari to quash decision of Industrial Court – Application refused – Appeal – Jurisdictional error – Industrial Relations Act 1967, ss 26(2) & 33B(1)

In this case, an officer of the appellant bank had been dismissed after a domestic inquiry on the basis that he had abused his position and misplaced the trust put in him as an officer of the bank. The respondent trade union took issue on his behalf and as a result the trade dispute was referred to the Industrial Court. The Industrial Court held the dismissal of the officer to be unduly harsh and therefore without just cause or excuse. The court ordered compensation in lieu of reinstatement and payment of bonus. The appellant then applied to the High Court for certiorari to quash the award but the application was dismissed. The appellant appealed.

Held, allowing the appeal (by a majority (Wan Suleiman SCJ dissenting)):

(1) Section 33B(1) of the Industrial Relations Act enacts a privative clause precluding certiorari in respect of any award, decision or order of the Industrial Court under the Act. A privative clause of this nature, however, is not operative in the face of jurisdictional defect or fraud and has no effect at all as regards jurisdictional review.

(2) For a jurisdictional error, it is not enough to establish error of law. It must be shown that that error goes to jurisdiction, power or validity.

(3) The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact-finding and the drawing of factual inferences from established facts as falling within the decision-maker's jurisdiction, unless the decision-maker has reached absurd results or reached results absurdly.

(4) A line of cases has recently emerged which asserts a judicial power to review decisions upon the ground that they lack a rationally probative basis in fact. There are some cases which assert that a jurisdictional error is committed if a decision-maker acts upon an incorrect basis in fact.

(5) In this case, on the facts, the decision of the Industrial Court was clearly perverse and so devoid of plausible justification that no reasonable body of persons could have reached it. The Industrial Court accordingly transcended its jurisdiction in making the award that it did and the privative provisions of 33B(1) of the Industrial Relations Act would not accordingly preclude the issue of certiorari in the circumstances.

[*Editorial Note*: The dissenting judgment of Wan Suleiman SCJ will be reported once it is made available.]